

\* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

March 23, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: August 9, 2004

Case No.: TIA-0153

XXXXXXX(the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be granted.

*I. Background*

**A. The Energy Employees Occupational Illness Compensation Program Act**

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the

Physician Panel Rule). The OWA was responsible for this program, and its web site provides extensive information concerning the program.<sup>1</sup>

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B.

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

## B. Procedural Background

The Applicant was employed as a secretary at the Portsmouth Gaseous Diffusion Plant (the plant). In her application, she stated that she worked at the plant for approximately 32 years - from 1953 to 1985. She also claimed to have worked sporadically on part-time assignments at the plant from 1985 to 1994. She requested physician panel review of four illnesses - colon cancer, lung cancer, breast cancer, and tongue cancer. The OWA forwarded the application to the Physician Panel, indicating to the Panel that the Applicant worked at the plant for 19 years, from 1953 to 1972. The OWA apparently relied on a letter from the site to that effect. See OWA Record at 16.

---

<sup>1</sup> [www.eh.doe.gov/advocacy](http://www.eh.doe.gov/advocacy)

The Physician Panel rendered a negative determination on all illnesses. The OWA accepted the Physician Panel's determinations on the illnesses. The Applicant filed the instant appeal.

In her appeal, the Applicant challenges the determinations on each of the illnesses and argues that the Panel did not consider her complete employment period. The Applicant states that her employment history detailed within the OWA record verifies that she was exposed to toxic substances for a longer period than the Panel considered.

## *II. Analysis*

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

We agree with the Applicant's contention that the Panel did not consider her entire employment period. The Panel report states that the Applicant was employed at the plant until 1972. Although that employment period is consistent with a letter from the site, see OWA Record at 16, there are numerous instances in the record that show the Applicant was employed full time at the plant through 1985 in a clerical position. OWA Record at 544, 549, 550. Accordingly, this additional period of employment should have received consideration. In addition, we believe further consideration should be given to the Applicant's claim that she was employed part time at the plant from 1985 to 1994. The Record provides some support for that assertion, OWA Record at 22, and, therefore, it is recommended that the Applicant be provided any opportunity to document that employment. OWA Record at 123.

As the foregoing indicates, the Panel based its determination on inaccurate information concerning the Applicant's dates of employment and, consequently, length of exposures, see OWA Record at 123 (exposure information). Accordingly, this application should receive further consideration.

In compliance with Subpart E, these claims will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims.

OHA's review of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0153 be, and hereby is, granted.
- (2) The Physician's Panel Report did not consider the Applicant's full period of employment. Reconsideration is in order.
- (3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: March 23, 2005